IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SONG SUK HAN, Appellant.	No. 32959-0-II UNPUBLISHED OPINION

Van Deren, A.C.J. – Song Han appeals his jury trial conviction of first degree assault with a deadly weapon sentencing enhancement, arguing that the trial court improperly refused to instruct the jury on the inferior degree offenses of second and third degree assault. We reverse and remand for new trial.

Facts

Unlawful Imprisonment

Han and Hwa Sin worked together at a teriyaki restaurant; Han had worked there before Sin became an employee. Han testified that Sin often spent the night at his Lakewood apartment; she testified that she visited and sometimes stayed late but didn't think she had spent the night. Han borrowed money from Sin. When he did not pay it back, she came to his apartment, took his car and home keys, and told him he could not leave to go to work until he paid her.[1] Sin admitted

[1] Sin quit work a week or two earlier when the restaurant required that she supply tax withholding

going to Han's apartment, taking his keys, and demanding money, but claimed that she did not retain Han's keys to get the money. But the restaurant owner and another employee testified that Sin called them from Han's apartment to tell them she would not let Han come to work until she got her money and that she demanded that the restaurant pay her Han's wages. Han also testified that Sin threatened to kill him, hit him, and threw his furniture around.

The loan dispute continued for at least two days. The restaurant fired Han when he did not report to work. Perhaps a day later, a restaurant employee met Han and Sin in a parking lot and divided Han's final wages between Han and Sin to satisfy Han's debt.

A day or two later, Sin returned to Han's apartment sometime between 9:00 and 9:30 a.m. because Han left her a note saying that he wanted to give her something and talk to her about something. Han asked her for money to pay his rent. When she refused, he struck her head several times with a frying pan and prevented her from leaving by simply standing near the door,[2] although he did not hit her again or threaten her. She testified that she was unable to leave or use the telephone to call for help even though Han frequently went to the bathroom. She could not remember whether she yelled for help. Sin testified that she neither ate nor drank and that Han consumed only water. At 4:00 p.m., she left when Han again used the bathroom. Han tried to pull her back into the apartment, ripping her shirt. Neighbors heard her scream and saw the pair wrestling on the ground, grabbing at each other's clothes.

Sin had injuries to her arm and head. But when a neighbor tried to separate them, only Han let go; Sin would not let go of Han. Sin, who appeared angry, hit Han, pulled his hair, and

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information.

[2] Sin also testified that Han threatened to call the police if she tried to leave.

screamed at him. After the neighbors told Sin to go home, she drove away in her car.

Han agreed that Sin was at his apartment from about 9:00 a.m. to 4:00 p.m. But Han's version was that Sin simply came by and asked if he was looking for another job, and when he asked for her help in regaining his former job at the teriyaki restaurant, she angrily refused. Han responded that he would not be able to pay his rent and Sin told him that she had never promised to pay his rent. Sin threatened that if he pursued the matter, she would have her boyfriend, who was a dangerous gangster, kill him. Sin began to strike him with his belongings, so he grabbed her hand. When she tried to hit him with a frying pan, he took it from her. She then tried to grab his neck while he was holding the pan; when he deflected her effort, he accidentally struck her with it, knocking her down.

Han then helped Sin onto the sofa, where she became emotionally despondent over her personal situation. When Han tried to call the police, Sin begged him not to because she did not want publicity. Han massaged Sin on the couch. He offered her water, but she asked for alcohol, so they drank beer together. They both slept for a time. After Han went to the bathroom, he saw Sin walking away without shoes. He followed her, but Sin grabbed and hit him and dragged him to various neighbors to argue about who was in the right.[3] The neighbors convinced Sin to leave and she drove away. Han testified that this all occurred the day after her earlier imprisonment of him, so that he had eaten virtually nothing for three days, leaving him hungry and weak.

Within an hour, Sin returned with her boyfriend,[4] who wanted Han to take Sin to the hospital for her head injury. She testified that she was not afraid of Han and decided to return to

[3] One of the neighbors testified that Sin gave a summary of the above events.

[4] She thought his last name was "Kwon"; she did not know his first name, despite sometimes spending the night with him.

his apartment rather than calling the police. She testified that her boyfriend demanded that Han take her to the hospital and then left her alone with Han.

Based on these facts, the State charged Han with the crime of unlawful imprisonment, contrary to RCW 9A.40.040.[5]

First Degree Assault Charge

Later that same day, Pierce County Sheriff's Deputy Andrew Guerrero went to Han's apartment complex in Lakewood in response to a 911 hang-up call. From inside, he heard a woman and a man yelling in a foreign language; he could also hear the sounds of a scuffle or of something being thrown. Sin moaned as she opened the door and staggered out, bleeding profusely from several wounds on her torso and arm and carrying a kitchen knife with a 5.5-inch blade; she then collapsed. Deputy Guerrero could see her intestines protruding from one of her wounds. Deputy Guerrero found Han in the apartment, sitting at a table staring at (and turning) his blood-covered hands.

According to Sin, after her boyfriend left, Han came out of the kitchen with the knife saying that he would kill her. He intentionally stabbed her several times as she screamed and tried to get away from him. She did not recall taking the knife away from him.

[5] The jury acquitted Han of this charge. We include this summary of the conflicting testimony in order to provide context to the testimony regarding the first degree assault charge.

According to Han, Sin and her boyfriend assaulted him, forced him to kneel on the floor for a long time, and threatened to kill him if he did not take her to the hospital. After the boyfriend left, Han was weak and unsteady. He went to the kitchen, where he grabbed the knife as he fell. He then walked toward Sin holding the knife, although he had triple vision. Sin walked toward him and began to struggle; they fell into each other several times. Sin took the knife from him and walked out the door. She was cut during their struggle, but Han did not cut her intentionally; instead, both parties were "acting out of [their] "wits." 5 Report of Proceedings (RP) at 495.

Sin suffered four wounds on her arm, three superficial and one that penetrated the muscle layer, but her surgeon did not expect that Sin would have future arm problems as a result of her injuries. The testifying orthopedic physician who treated her arm could not provide detailed information about Sin's abdominal injuries,[6] but he testified from the medical records regarding those injuries. The records reflected that Sin had low blood pressure when she arrived at the hospital and needed 12 units of blood during surgery. They also revealed that Sin suffered four wounds to her abdomen, three superficial and one that penetrated the abdominal cavity. As a result of the penetrating abdominal wound, she suffered some small cuts to her intestines, a laceration of her liver, and a laceration of her bowel lining. The abdominal surgeons repaired the intestinal injuries but did not repair the liver. The orthopedic surgeon could not testify about the "seriousness" of the penetrating abdominal injury or about the depth of the liver injury. At the time of trial on February 7, 2005, Sin had scars on her arm and torso.

The State charged Han with first degree assault under RCW 9A.36.011(1)(c), alleging as

[6] The State did not call any witnesses who treated the apparently more serious abdominal injuries.

follows:

> That SONG SUK HAN . . . did . . ., with intent to inflict great bodily harm, intentionally assault Hwa Sin and inflict great bodily harm.

Clerk's Papers at 1. The trial court instructed the jury on self-defense, specifically instructing that such use of force is lawful only if the defendant used a reasonable amount of force. Han requested the inferior degree jury instructions on second, third, and fourth degree assault. The trial court refused to instruct on the inferior degree crimes:

> I'm not going to give the Assault II or the Negligent [sic] or the Assault III. There's essentially two theories of the case. There's the theory presented by the prosecutor that this was all intentional and the injuries were within the definition of great bodily harm. The theory of the defense is that there was quite an argument, and, if anything, Mr. Han was simply defending himself from Ms. Sin's conduct. And there isn't any other way of looking at the evidence besides those two ways.

5 RP at 525.

The jury convicted Han of first degree assault and, by special verdict, found that he had been armed with a deadly weapon. Han unsuccessfully moved for a new trial based on the court's failure to instruct the jury on the inferior degree crimes of second and third degree assault. The court imposed a standard range sentence. Han appeals, assigning error only to the trial court's failure to instruct the jury on the inferior degree offenses of second and third degree assault.

Analysis

By statute, when a defendant is charged with an offense with more than one degree, "the jury may find the defendant not guilty of the degree charged . . . and guilty of any degree inferior thereto." RCW 10.61.003. The trial court should instruct on an inferior degree offense when

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior

offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)); *accord State v. Winings*, 126 Wn. App. 75, 86-87, 107 P.3d 141 (2005); *State v. McDonald*, 123 Wn. App. 85, 88-89, 96 P.3d 468 (2004). The first two parts of this standard are the legal component, and the parties agree that they are met in this case; only the factual component is at issue.

We review the evidence in the light most favorable to the party seeking the inferior degree jury instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56; *McDonald*, 123 Wn. App. at 89. The inferior degree instruction is required if the evidence, viewed in this light, would allow a rational jury to acquit the defendant of the charged offense and convict him of the inferior offense. *Fernandez-Medina*, 141 Wn.2d at 456; *State v. Keena*, 121 Wn. App. 143, 149, 87 P.3d 1197 (2004). In addition, the evidence must affirmatively support giving the inferior degree instruction; the possibility that the jury will disbelieve the evidence supporting the charged crime is insufficient to support instructing on an inferior degree. *Fernandez-Medina*, 141 Wn.2d at 456.

But in deciding whether to instruct on inferior degree crimes, the trial court must not limit itself to consideration of only the defendant's testimony; instead, it must consider all the evidence presented at trial. *Fernandez-Medina*, 141 Wn.2d at 456; *State v. Stevens*, 127 Wn. App. 269, 277, 110 P.3d 1179, *review granted*, 155 Wn.2d 1024 (2005). And even if the defendant presents a defense theory that is inconsistent with an inferior degree instruction, the court still must give it if the evidence supports doing so. *Fernandez-Medina*, 141 Wn.2d at 457-61.

The trial court rejected Han's requested inferior degree instructions based on Han's self-defense theory precluding any other defense theory. But our Supreme Court rejected this

approach in *Fernandez-Medina*, 141 Wn.2d at 457-61. We review the evidence in the light most favorable to Han to determine whether a reasonable jury could infer that he did not commit the charged offense but did commit an inferior degree offense. *See Stevens*, 127 Wn. App. at 277-78; *Winings*, 126 Wn. App. at 87. To avoid invading the jury's fact-finding function, we do not weigh the evidence or evaluate its consistency or inconsistency with other evidence.[7] *See Fernandez-Medina*, 141 Wn.2d at 460-61. Otherwise, we license the "courtroom hegemony" condemned by our Supreme Court. *Fernandez-Medina*, 141 Wn.2d at 461.

Han proposed a third degree assault instruction under RCW 9A.36.031(1)(d), requiring proof that the defendant, acting with criminal negligence, caused bodily harm to another by means of a weapon. Criminal negligence is statutorily defined:

> A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

[7] Thus, we do not evaluate Han's version of events nor express our opinion of its veracity. The relevant question is whether the record, when viewed in the light most favorable to Han, contains evidence from which a rational jury, if it chose to believe that evidence, could acquit Han of the charged crime but convict him of an inferior degree of the charged crime. As when we review the sufficiency of the evidence in other contexts, we evaluate the burden of production, not the burden of persuasion. *See In re Dependency of C.B.*, 61 Wn. App. 280, 282-83, 285-86, 810 P.2d 518 (1991).

RCW 9A.08.010(1)(d). Neither party disputes that Han used a weapon and inflicted bodily harm. The issue is whether the evidence supports a reasonable inference of criminal negligence and whether the evidence would allow a rational jury to acquit on the greater offense.

Here, if the jury believed Han's version, it could infer that he lacked the intent to inflict great bodily harm or even to stab Sin. But the evidence, including the size of the knife, the nature of the injuries, and Han's testimony, would allow a rational jury to infer that Han acted with criminal negligence by stumbling around holding a knife with a 5.5-inch blade, particularly while struggling with Sin. Han's testimony, if believed, could support a finding that he failed to be aware of a substantial risk that he would stab Sin and that this failure was a gross deviation from the actions of a reasonable man.

Han's self-defense theory also supports the third degree assault instruction. The jury could infer a basis for self-defense if it believed Han's testimony. But the jury could also reasonably infer that he used more force than was necessary either due to (1) the size of the knife or (2) the nature of the wounds inflicted. The jury could thus rationally infer that Han's use of excessive force was criminally negligent rather than intentional, satisfying the elements of third degree assault.

Han also asserts that a second degree assault instruction should have been given. He argues that a rational jury could have found Sin's injuries consistent with substantial bodily harm rather than great bodily harm. Because we remand for a new trial, we need not rule on this or on the other rationale for instructing the jury on second degree assault. The evidence at the new trial may differ regarding the extent and effect of Sin's injuries, and the trial court must decide, based on the evidence at that trial, whether to instruct on second degree assault.

We reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

VAN DEREN, A.C.J.

We concur:

ARMSTRONG, J.

HUNT, J.